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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1609

INTERNATIONAL PAPER COMPANY,
Petitioner,

vs.

STATE OF MISSISSIPPI, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. _____

INTERNATIONAL PAPER COMPANY,
Petitioner,

vs.

STATE OF MISSISSIPPI, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Mississippi as reconsidered and made final on March 5, 1973. That Court's opinion is reported 271 So. 2d 395, copy annexed as Appendix "A", page A1 hereof, with dissenting opinion on rehearing at Appendix "B", page A11 hereof.

JURISDICTION

The Supreme Court of Mississippi by confecting a new and unprecedented rule—by judicial legislation—destroyed Petitioner's title to approximately 5000 acres of lands which, for valuable compensation paid, had been conveyed

by the State itself to Petitioner's predecessors in title many decades ago. The State's conveyances were authorized by a specifically applicable, admittedly constitutional general statute first passed by the Legislature in 1884 and thereafter re-enacted in all succeeding Codes of the State.

Until the decision at bar was rendered, Petitioner had no reason to anticipate that the State Court itself would create a law and then retroactively apply that law to impair the State's own contracts, thereby to retake without compensation the property which Petitioner and its predecessors had been exclusively and peaceably possessing, annually paying taxes thereon to the State itself. The opinion of the State Court was handed down and the judgment here complained of was entered July 3, 1972, Appendix "A", pp. A1 and A10 hereof.

Petitioner timely filed Petition for Rehearing which was denied January 2, 1973. Copy of Opinion on Rehearing, in Dissent, and Judgment of the Court thereon is annexed as Appendix "B", pp. A11 and A17 hereof.

Because of the constitutional questions involved, Petitioner sought leave to file "Motion in Arrest of Judgment and to Vacate and Alter Same". Copy of the Motion, accompanying the Petition for Leave, filed January 31, 1973, appears as Appendix "C", p. A18 hereof. The federal constitutional questions were specifically raised at Sections 4, 5 and 6 of said motion. Brief in support was appended.

The State Court, as its order recites, duly "considered" the motion and then "overruled" same on March 5, 1973, as shown Appendix "D" hereto, p. A20 hereof.

That the motion was entertained upon its merits and the federal constitutional questions therein specifically raised were considered and rejected on the merits rather than upon any procedural ground is elucidated upon and

made certain by certificate of the Chief Justice of the Supreme Court of the State of Mississippi, Appendix "E", p. A21 hereof.

That the Supreme Court of Mississippi is privileged under its rules to so act is shown *Home Ins. Co.* v. *Watts, et al.*, 229 Miss. 735, 93 So. 2d 848 (1957). The case of *Cincinnati, etc., Packet Co.* v. *Bay* (Ohio 1906), 26 S. Ct. 208, 200 U.S. 179, 50 L. Ed. 428, is therefore applicable, where Mr. Justice Holmes, for this Court, said:

> "The record shows that the question was raised and the certificate shows that it was not treated as having been raised too late under the local procedure,—*a point upon which the state court is the judge.* It is enough that the Federal question was raised and necessarily decided by the highest court of the state. Farmers' & M. Co. v. Dobney, 189 U.S. 301, 47 L. Ed. 821, 23 Sup. Ct. Rep. 565." (Emphasis supplied by us)

See also *Gulf & Ship Island R. R. Co.* v. *Hewes*, 46 L. Ed. 86, 183 U.S. 66; and *Chicago B. & Q. R. Co.* v. *Chicago*, 41 L. Ed. 979, 166 U.S. 226.

That Petitioner had within 90 days of said order of March 5, 1973, to file this Petition is shown *Gypsy Oil Co.* v. *Esco*, 275 U.S. 498, 72 L. Ed. 393, where this Court announced:

> "If, however, a timely motion for leave to file the second petition is granted, and the petition is actually entertained by the court, then the time within which application may be made here for certiorari begins to run from the day when the court denies such second petition."

This Court's jurisdiction is invoked 28 U.S.C.A., Section 1257 (3).

QUESTIONS PRESENTED

1. Whether the decision of the State Court at bar, the effect of which is to judicially nullify an admittedly constitutional and unambiguous state statute based upon which the State had granted and Petitioner had acquired title to lands, violates the rights guaranteed to Petitioner at Article I, Section X, of the Constitution of the United States by impairing the obligations of a contract.

2. Whether such action of the State Court in judicially legislating can validly deprive Petitioner of property without any compensation in violation of the rights guaranteed Petitioner by Amendment XIV of the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section X, of the Constitution of the United States:

> "No State shall * * pass any * * ex post facto Law, or Law impairing the Obligation of Contracts * * "

Amendment XIV of said Constitution:

> " * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * "

The State statute involved, Chapter 17, Laws of the State of Mississippi of 1884, now Section 4123 of the Mississippi Code of 1942 Annotated, is quoted verbatim in the Court's opinion, Appendix "A".

STATEMENT OF CASE

The full facts appear in Petitioner's Complaint, to which demurrer by the State was interposed and sustained. A copy of that Complaint appears Appendix "F", p. A23 hereof.

The case involves the title to lands which had vested in the State upon its admission to the Union in 1817 as tidelands. These lands laid between two fresh water streams at and near their outlet to the Gulf of Mexico. Through process of natural accretion, the area in large part arose above the level of mean high tide. The Legislature had this area surveyed and given the name "Lowry Island" and by Chapter 17 of the Laws of 1884 authorized the sale thereof to private persons for valuable considerations to be paid. This law through re-enactment has continued in effect to the present day.

Various sales were made by the State of the Lowry Island area, among which were the ones through patents issued in 1895, 1897 and 1917 to Petitioner's predecessors in title. Petitioner and its predecessors have since been in the open, notorious, exclusive and peaceful possession of that covered by these state patents, exercising full dominion over said lands. The state annually exacted and Petitioner and its predecessors paid ad valorem taxes to the State.

As the Complaint shows, Petitioner asserts no claim to any portion of the area which forms the bed of a well-defined stream or watercourse, and the private ownership, possession and use of any areas below mean high tide has never constituted nor will it by Petitioner in the future constitute any obstruction to any navigable waters or "have

any tangible effect on the right of the public to use the navigable waters of the State for fishing, boating, swimming and related endeavors".

This suit was one for injunction to restrain the state from the threatened taking without compensation of Petitioner's claimed ownership in Lowry Island for its highway purposes and for the purpose of quieting Petitioner's title as against any claim of title of the State.

The general demurrer of the State of Mississippi was sustained by the trial court and that decision affirmed upon appeal by the State Supreme Court. The affirmance was based upon an asserted common law principle which was applied to prevail over the 1884 statute which was in full force when the State parted with its title to Petitioner's predecessors.

The stage of the proceedings below and the manner in which the federal questions here for review were raised is detailed in the Jurisdictional Statement, supra.

REASONS FOR GRANTING WRIT

1. Relative to Article I, Section X, of the Federal Constitution

Chapter 17, Mississippi Laws of 1884, was not only a constitutionally valid legislative announcement of public policy but was consistent with the common law rule then judicially recognized by the State exemplified in the decision of *Martin* v. *O'Brien* (Miss. 1857), 34 Miss. 21, which was the same rule of common law recognized by this Court to exist in Oregon as well as other states of the Union. *Shively* v. *Bowlby,* 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1893).

Absent a constitutional prohibition, which admittedly never existed at bar, any subsequent judicial departure from the unambiguous language of the statute was invalid both as an illegal and unconstitutional invasion by the judiciary of the legislative province and as a violation of the constitutional protection to which Petitioner is entitled against the impairment of the obligation of its contract.

As this Court said in *Chicago* v. *Sheldon,* 9 Wall. 50, 76 U.S. 50, 19 L. Ed. 594:

> "A contract having been entered into between the parties, valid at the time, by the laws of the State, it is not competent even for its Legislature to pass an Act impairing its obligation, much less could any decision of its courts have that effect."

See also *Gelpcke* v. *Dubuque,* 1 Wall. 175, 17 L. Ed. 520, 68 U.S. 520, and *Havemeyer* v. *Board of Supervisors of County of Iowa,* 3 Wall. 294, 18 L. Ed. 38, 70 U.S. 407.

The Supreme Court of Mississippi in its opinion (Appendix "A") announced: "We find no authority sugges-

tive of title to noncontiguous emerging tidelands whose characteristics have changed from tidelands to fast dry lands." The State court was not privileged itself to create and retroactively apply a law impairing the obligations of the state contracts here involved. As this Court said in *Muhlker* v. *New York & H. R. Co.*, 49 L. Ed. 872, 197 U.S. 544, here apt:

> "We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract."

The grants at bar by the State unquestionably constituted an obligation entitled to the protection of Article I, Section X, of the Federal Constitution. Speaking through Chief Justice Marshall, this Court so held in *Fletcher* v. *Peck*, 6 Cranch (U.S.) 87, 136, 137, 139, 3 L. Ed. 162, 177-179; and more recently in *Wood* v. *Lovett*, 85 L. Ed. 1404, 313 U.S. 363, confirmed:

> "Under the settled rule of decision in this court the execution of the State's deeds to the appellants constituted the execution or consummation of a contract, the rights arising from which are protected from impairment by Article 1, Sec. 10 of the Constitution; and the obligation of the State arising out of such a grant is as much protected by Article 1, Sec. 10, as that of an agreement by an individual."

This Court has always recognized, *Murray* v. *Charleston*, 24 L. Ed. 760, 96 U.S. 432:

> "There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them, as made, are foundations of all well ordered society and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed."

This court's decision in *Appleby* v. *New York*, 271 U.S. 364, 70 L.Ed. 992, assuming jurisdiction and reversing the New York courts, is here controlling. The courts of Mississippi are not free to nullify state grants, valid when made, and appropriate to the state the ownership of the dry, fast lands here involved simply because they are in a geographical area over which the tide once ebbed and flowed. Without Federal Court intervention petitioner will be deprived of the protection to which it is entitled by Article I, Section X of the Constitution of the United States.

2. Relative to the 14th Amendment to the Constitution

No state legislature may enact, and consequently no state court can establish, a law and apply it retroactively to enable the state to constitutionally take, without compensation, the property of a citizen entitled to the protection of the 14th Amendment. This appears settled by the law announced *Houston & Texas Central Railway Co.* v. *Texas*, 170 U.S. 243, 188 S. Ct. 610, 42 L. Ed. 1023; *Campbell* v. *Holt*, 115 U.S. 620, 6 S. Ct. 209, 29 L. Ed. 483; and *Chicago, Burlington & Quincy R. Co.* v. *Chicago*, 166 U.S. 226, 41

L. Ed. 979. In the latter case the Court recognized it to be the law:

> "The conclusion of the court on this question is, that since the adoption of the 14th Amendment compensation for private property taken for public uses constitutes an essential element in 'due process of law', and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution."

The Federal Constitution serves as a shield preventing the State of Mississippi, through its courts or otherwise, from nullifying the titles which had been validly vested by the State in Petitioner's predecessors in title and in terminating Petitioner's long recognized ownership and possession without due compensation.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

No. 46,635

INTERNATIONAL PAPER COMPANY OF MOSS POINT, MISSISSIPPI

v.

MISSISSIPPI STATE HIGHWAY DEPARTMENT

PATTERSON, JUSTICE:

This is an appeal by International Paper Company from a decree of the Chancery Court of Jackson County which sustained a general demurrer to the appellant's bill of complaint. The complainant sought an injunction against the State from entering upon certain lands located on Lowry Island in Jackson County and to cancel the State's claim of title thereto. We affirm the order of the lower court.

The lands in question are part of a large area located between the east and west branches of the Pascagoula River. In 1817 when Mississippi was admitted to the Union, this area was interspersed with islands and marshes and entirely subject to overflow from high tide of the Gulf of Mexico. Between 1817 and 1884 the elevation of the area increased due to natural accretion and portions of the area were no longer subject to overflow by high tide although on occasion it was inundated by the high waters of the Pascagoula River.

In 1884 the Mississippi Legislature at the insistence of then Governor Lowry, provided, by Chapter 17, Laws of 1884, for the swampland commissioner to have the area, which thereafter became known as Lowry Island, surveyed and sold.

J. M. T. Hamilton was commissioned to conduct this survey and his report indicates that Lowry Island was at that time mostly marsh and tidelands. He reported in part as follows:

> . . . In many places the soil was so boggy that it was impossible to find footing for men and instruments, thus causing a loss of time for offsets and triangulation. Large streams to be crossed frequently, much delay was caused by waiting for the boats to find their way to the line.
>
> All passing to and from work, was necessarily done in boats, following the meanders of the streams from camp to work and returning in the same manner, as it is impossible for a man to walk any considerable distance in one direction without the use of a boat. Men are compelled to proceed slowly and cautiously, if not, at any time they may be floundering in mud to their armpits.
>
> * * * *
>
> All of this land is subject to periodical overflow, during freshets in the rivers, only a small portion of which is subject to overflow, from high tide, a greater portion of which lies south of the Louisville and Nashville Railroad.

The provisions of Chapter 17, Laws of 1884, were brought forward and appear in the Code of 1892 as Section 2580 as follows:

> Other lands; sale of and price fixed—All lands fallen or falling to the state by escheat, or coming to it in any other manner; and all accretions of land not the subject of private ownership, and particularly those accretions near the mouth of the Pascagoula river, heretofore surveyed by the state; and all other lands

> within the borders of the state, and not belonging to the United States nor owned by another, are the property of the state, and are to be managed and disposed of through the land-office; and the land-commissioner may sell any of such lands at the same price as the swamp and overflow lands, subject to be fixed in the same manner and under like regulations. He may, in his discretion, rent out any public land which is improved or tillable, in the same manner and under like conditions as he may rent out improved or tillable tax-land.

The foregoing section was carried forward verbatim as Section 2919, Code of 1906, and now appears as Mississippi Code 1942 Annotated section 4123 (1956).

Subsequent to Hamilton's survey, much of the land called Lowry Island was sold by the State. The State issued patents to the lands involved here to complainant's predecessors in title in 1895, 1897 and 1917, and the titles then passed by mesne conveyances to the complainant. Since 1967 the complainant has had possession of the land and has paid taxes on it as have its predecessors. The area does not lend itself to the normal characteristics of possession inasmuch as it is marsh and swampland. The payment of taxes is the dominant evidentiary element of ownership or possession.

Title to Lowry Island lands has been the subject of dispute for many years. The State of Mississippi, as reflected by several advisory opinions issued through the Attorney General's office, has expressed the belief that title to Lowry Island lands remains vested in the sovereign.

When plans for the development and construction of Interstate 10 became known, the State disclosed its intention to traverse a part of Lowry Island which is claimed

by International Paper Company. Thereafter, the highway department entered upon the lands and marked the course across which the highway was to be constructed and the appellant brought this action to cancel the claim of the State of Mississippi and to enjoin the Mississippi State Highway Department from entering upon the property without first securing a right-of-way in conformity with the applicable statutes on eminent domain.

The chancellor below sustained a general demurrer of the State of Mississippi and International Paper has appealed from that decree.

Under the common law both the title and domain of the sea, rivers, and arms of the sea, where the tide ebbs and flows, and of all land below the high water mark, were vested within the King in trust for the public. *Shively* v. *Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1893). When the American Colonies achieved freedom following the Revolutionary War, "the ownership of, and dominion and sovereignty over, lands covered by tidewaters, and the fresh waters of the Great Lakes, within the limits of the several states, belonged to the respective states within which they were found, with the consequent right to use or dispose of any portion thereof, when that could be done without impairment of the interest of the public in the waters, subject to the right of Congress to control their navigation for the regulation of commerce." [*Money* v. *Wood*, 152 Miss. 17, 28, 118 So. 357, 359 (1928)].

In 1817 upon admission of Mississippi to the Union, the State became vested as trustee with "the title to all the land under tide-water, including the spaces between ordinary high and low water marks; this title of the state being held for public purposes, chief among which purposes is that of commerce and navigation, for which latter purposes the title of the state is subservient to such regulations as

may be constitutionally made by the national government, in said matters of navigation and commerce." [*Rouse* v. *Saucier's Heirs*, 166 Miss. 704, 713, 146 So. 291, 292 (1933)].

The bill of complaint alleges that in 1817 the land in question was subject to the ebb and flow of high and low tides. There would seem to be little doubt that the land masses which thereafter arose through accretion and which was not contiguous to private property, belonged to the State. The bed of a bay is property of the state and all bodies of land arising from or upon such state-owned bay floor become and are property of the state. Where certain tracts are not in existence at the time of the land grant to the state and they are subsequently formed by deposits of silt, soil, etc., from a river, title vests in the state. *Giles* v. *Basore*, 278 S.W.2d 830 (Tex. 1955). This case, however, does not draw a distinction between emerging contiguous lands and those which are noncontiguous. In *Moore* v. *Kuljis*, 207 So.2d 604 (Miss. 1967), this Court held in following the precedents of *Harrison County* v. *Guice*, 244 Miss. 95, 140 So.2d 838 (1962); *Skrmetta* v. *Moore*, 227 Miss. 119, 86 So.2d 46 (1956); and *Skrmetta* v. *Moore*, 202 Miss. 585, 30 So.2d 53 (1947); that property owners adjacent to tidelands were entitled to the accretionary buildup thereto whether it resulted from man-made or natural accretion. We find no authority suggestive of title to non-contiguous emerging tidelands whose characteristics have changed from tidelands to fast dry lands.

In *Hogue* v. *Bourgois*, 71 N.W.2d 47, 54 A.L.R.2d 633 (N.D. 1955), the North Dakota Supreme Court indicated that where an island or accumulation of land formed apart from the mainland by deposits of alluvial accretions in the bed of a navigable stream, but such accumulation or island of land had not become "fast dry land" at the time the State was admitted to the Union, title of such land or accumulation together with all additions thereto formed by

the natural causes through the gradual process of accretion, vested in the State.

From the bill of complaint we note that the appellant seeks cancellation of the State's claim to all of the lands described therein except the well defined navigable streams. It therefore claims title to the marshlands below mean high tide as well as title to any lands that have emerged by accretion so that they are now fast dry lands. The issue before the Court is whether the legislature had the authority to convey in fee simple the marshlands as well as the accreted land on Lowry Island for private benefit.

The chancellor reasoned that such authority was not present, indicating "that the ownership of the state was and is as trustee for the use and benefit of all of the people of the state and it is not subject to conveyances to private individuals for private purposes." This Court in initially discussing the public trust by which title to tidelands is held by the State, held in *Money, supra*, that the sovereign could not convey in fee simple the title to submerged trust property to private owners for private purposes. In the case of *Rouse* v. *Saucier's Heirs*, 166 Miss. 704, 146 So. 291 (1933), we considered the issue of whether the State, and somewhat obliquely the Federal Government, could convey fee simple title to marshlands situated along the Wolf River which flows into the Bay of St. Louis to an individual for private purposes. Justice Griffith, speaking for the Court, stated:

> Neither the state nor the federal government can validly convey title in fee simple to an area such as above mentioned to private owners for private purposes. To what extent and what title may be conveyed for public purposes, and particularly for the purposes of commerce and navigation and fisheries, is not here before us, and an academic discussion will therefore

not be undertaken upon that subject. (166 Miss. at 713, 146 So. at 292).

To the same effect *see Parks* v. *Simpson*, 242 Miss. 894, 137 So.2d 136 (1962); *Giles* v. *City of Biloxi*, 237 Miss. 65, 112 So.2d 815 (1959); *Xidis* v. *City of Gulfport*, 221 Miss. 79, 72 So.2d 153 (1953); *Crary* v. *State Highway Commission*, 219 Miss. 284, 68 So.2d 468 (1953); *State* v. *Stewart*, 184 Miss. 202, 185 So. 247 (1939); and *State* v. *Stewart*, 184 Miss. 202, 184 So. 44 (1938). We are of the opinion from these authorities that the chancellor below properly sustained the demurrer to the bill of complaint which challenged the State's title to those lands below the level of mean high tide.

The appellant contends, however, that the most recent pronouncement of this Court upon the subject, *Treuting* v. *Bridge & Park Commission of the City of Biloxi*, 199 So.2d 627 (Miss. 1967), eroded the rule announced in *Money, supra*, and the cases following it. In *Treuting* the principal issue was whether a conveyance by the State of filled-in tidelands was a valid exercise by it of its duty to the citizens of the state as trustee of the tidelands. We stated that the legislature had authority to provide for the sale of lands filled in above the ebb and flow of the tide by spoil derived from shoal waters to private owners when incident "to the overall public intent and purpose in accommodating an expanding population, commerce, tourism and recreation." We observe that this case is an exception to the general rule which prohibits the sale by a trustee to anyone for a private purpose. The case was restricted in its terms to the circumstances there existing which arose from special legislation directed to a particular area. We held this authority of sale valid only because a public purpose resulted which was clearly paramount to the private interest. The case is not authority for nor does it lend validity to the act of the legislature in 1884 which

attempted to authorize the sale of the state's trust lands lying between the east and west branches of the Pascagoula River to private persons for private purposes.

Perhaps the more intricate and related question is whether the State was empowered to sell for private purposes at the time it attempted to sell the accreted lands not contiguous to private property that had arisen above mean high tide. While it is true that the character of the land, admitted by demurrer, has changed by accretion from the time it vested in the State until the time of the legislative enactment and that perhaps its paramount use for navigational purposes has diminished, nevertheless it is our opinion that these changing characteristics of the land did not displace the trust imposed upon the State for the public. In *Treuting, supra*, we noted the continuation of the common law trust in the following language:

> Under the particular facts of this case, the chancery court was warranted in concluding that the state could convey to the Park Commission fee simple title to the submerged lands in question, for public purposes and uses in the overall development of Deer Island. Moreover, the legislature was justified in authorizing sale of these lands, when filled in and developed, to private individuals as an incident to the overall public interest and purpose in accommodating an expanding population, commerce, tourism and recreation. There will be no substantial interference with the original purposes of the trust imposed upon the state in connection with these submerged lands, and the development as authorized by the statutes is consistent with the public trust. . . . (199 So.2d at 633).

The authorized development was held to be consistent with the public trust and in the public interest. Here the claim of title by the appellant is directed to a private in-

terest, a distinction from *Treuting* of such significance that it does not control the present case involving a paramount private interest. We conclude that the decree of the lower court sustaining the demurrer should be affirmed.

The appellant next contends that the assessment and collection of taxes on these lands by the State for a period in excess of half a century, together with its failure to file suit to set aside the patent, should in equity estop the State from contending its patents to be invalid. It cites in support of this position the recent case of *State* v. *Stockett*, 249 So.2d 388 (Miss. 1971). We are of the opinion this argument is not well founded since the facts in *Stockett, supra*, were substantially different from the admitted allegations of the present bill of complaint. We are of the opinion that this contention is unavailing and that the decision of the lower court should be affirmed.

AFFIRMED.

GILLESPIE, C.J., AND SMITH, ROBERTSON AND SUGG, JJ., CONCUR.

IN THE SUPREME COURT OF MISSISSIPPI

MONDAY, JULY 3, 1972, COURT SITTING

#46,635

INTERNATIONAL PAPER COMPANY OF MOSS POINT, MISSISSIPPI

VS

MISSISSIPPI STATE HIGHWAY DEPARTMENT

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Jackson County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the decree of said Chancery Court rendered in this cause on the 29th day of June, 1971-be and the same is hereby affirmed. It is further ordered and adjudged and decreed that the appellee do have and recover of and from the appellant and Maryland Casualty Company of Baltimore Maryland, surety on the appeal bond herein, all of the costs of this appeal to be taxed for which let proper process issue.

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I, Mrs. Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of the judgment entered by the Court in the cause therein stated, as the same appears of record on file in my office.

Given under my hand, with the seal of said Court affixed, at office, in the city of Jackson, Miss., this the 15th day of March, A. D., 1973.

/s/ Julia H. Kendrick

(Seal) Clerk of the Supreme Court

APPENDIX "B"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 46,635

INTERNATIONAL PAPER COMPANY OF MOSS POINT, MISSISSIPPI

v.

MISSISSIPPI STATE HIGHWAY DEPARTMENT

SMITH, JUSTICE, DISSENTING:

On Petition for Rehearing

I must, with great deference, dissent from the action of the majority in denying the petition for rehearing. I have reached the conclusion that rehearing should have been granted.

It should be declared by this Court that no common law rule, including the one dealt with in the majority opinion, not embodied in a constitutional provision, can survive or withstand a legislative enactment specifically dealing with the subject matter and providing a contrary rule. At the least, it seems to me, if the Court should be unwilling to prefer the statute to the common law rule, the lower court should be reversed, the demurrer overruled and the case remanded for trial upon the merits for the purpose of determining what part, if any, of the patented lands in fact lie above mean high water (not within the ebb and flow of the tide) so as not to be subject to the rule.

The decision of the majority is an echo of an age long past. The so-called "rule" of the common law relied upon for the result came into being in the days of the absolute personal rule of Kings. In 1938 in *State* v. *Stewart*, 184 Miss. 202, 184 So. 44, 49, the Court quoted from *Shively*

v. *Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1893) as follows:

> . . .[U]nder the common law, the title of land beneath the rivers and arms of the sea, where the tide ebbs and flows, belonged, *jus privatum*, to the King as the sovereign; and that the dominion thereof *jus publicum*, was vested in him as the representative of the nation and for the public benefit.

In *State* v. *Stewart*, *supra*, this Court also stated:

> [W]e hold the State of Mississippi to be the absolute owner of the title of the soil, and of the minerals therein contained, in the beds of all of its shores, arms and inlets of the sea, wherever the tide ebbs and flows, as trustee for the people of the State, and subject only to the paramount right of the United States to control commerce and navigation, with the consequent right to use or dispose of any portion thereof, when that can be done *without impairment of the interest of the public in the waters*, subject to the paramount right above mentioned, and not inconsistent with Section 81 of our state constitution. (Emphasis added).

This case in no way involves the obstruction of any navigable stream, or interference with navigation or fisheries. In no way does it involve any "impairment of the interest of the public in the waters."

It is to be borne in mind that the amended bill was dismissed on general demurrer. The complainant deraigned its title from patents granted by the State of Mississippi to private purchasers, executed pursuant to statutes duly enacted by the Legislature by the State's authorized officers. The State patents in this case were executed, respectively, in the years 1894, 1895, 1897, and 1917. Afterward, and prior to the conveyance of the

property to the present complainant, the land was bought, sold, paid for and conveyed in all good faith by various private owners (unless the State's solemn patent conveyed no title) and title finally became vested in the complainant by purchase and conveyance. Throughout the more than three-quarters of a century which elapsed following the date of the grant of the earliest of the patents, the land has been given for taxation, has been duly assessed and taxes paid thereon and has been dealt with in every respect as privately owned.

It is now asserted by the State in this suit that, since it desires to use a part of the land, it has never parted with its title to any of it, because, it is said, it could not do so under the "common law" rule. It follows, therefore, that the common law is to be considered perpetual and paramount and to supersede and nullify statutory enactments of the Mississippi Legislature dealing with the subject lands.

The bill asserts that there is a substantial part of the land embraced within the boundaries of the land described in the patents which lies above mean high tide. It also expressly negatives the proposition that its ownership or use interferes with or impedes commerce, navigation or fishing. Actually, as has been said, these are areas preempted by the United States and Federal regulations control.

Some public right may exist in those parts of the lands over which it may be established that the tide ebbs and flows, which a private owner may not lawfully abridge or impair. For instance, obstruction of a navigable stream would be unlawful. Do such facts, however, if they exist, render void title to all portions of the land bought and held in good faith by a succession of owners over a period of many years? The consequences of such a rule are incapable of being known, measured or foreseen.

The context in which the rule first saw the light of day was wholly dissimilar and in no way comparable to present circumstances now existing in Mississippi. Then the King ruled, it was said, by Divine Right. He exercised what was known as his Royal Prerogative. He might grant lands or take them away at his pleasure. Wars were fought and won or lost before any restriction or limitation upon the exercise of the Royal Prerogative could be imposed. The "people", as we understand that term in the present context, were not represented in those days, even in Parliament, since the franchise was narrowly restricted. The "commonality" had no voice by means of which they could make themselves heard. In fact, in England it was not until the adoption of the Reform Act of 1867 that there was a semblance of universal suffrage by general enfranchisement of the male population.

Under the form of government which exists in this country, the people act and speak through their freely chosen representatives in Congress and in State Legislatures. In the enactment of law these bodies, at least theoretically, are limited only by the provisions of the Federal and State Constitutions. It has been truly said that while courts serve the people, the members of Congress and of Legislatures represent them.

The rule relied upon by the majority as denying the Legislature the power to authorize disposal of these lands has no recognizable sanction in either the State or Federal Constitution. It is incredible, it seems to me, that in Mississippi in modern times a common law rule has been declared to be controlling and to nullify an express statute enacted by the Legislature. As a matter of fact, this Court in *Treuting* v. *Bridge and Park Commission of City of Biloxi*, 199 So.2d 627 (Miss. 1967) approved the action of the Legislature in authorizing the disposition of lands said to fall within the category embraced within the rule. It

was said in that case that the private uses contemplated were merely incidental to a paramount public purpose but were nevertheless essential thereto. This Court in *Treuting* approved the action of the Legislature in authoring disposition of lands said to fall within the category embraced by the rule, even though such action would result in private ownership, because, it was said, this would serve public purposes of tourism and recreation.

It could be argued with equal logic, it seems to me, that the obtaining of money for public use through the sale of lands such as these could be considered a "public purpose" as well as putting such lands on the tax roles and allowing them to be employed and developed as contributing to the general public economy of the State.

While this statement as to *Treuting* may be an over simplification of that case, the case does serve to indicate to me that the "rule" has not been considered by this Court to be an unsurmountable obstacle to the conveyance of lands of the type referred to such as would have been the case if grants of that character had been constitutionally prohibited.

The voice of the Legislature is the voice of the people. The Legislature having spoken in this area, the common law rule no longer exists insofar as it conflicts with the statute.

I cannot agree that it is within the prerogative of the judiciary to set at naught a plain statute which conflicts with no constitutional provision (as we have seen in *Treuting, supra*) on the basis of a contrary common law rule devised centuries ago to curb the actions of the absolute monarch. The repose of land titles is and has long been a major and fundamental objective of the law. Statutes of limitation and the doctrine of equitable estoppel have been devised and enforced to circumvent the success-

ful assertion, after long periods of time, of supposed claims of title to land.

In *Warren County* v. *Lamkin*, 93 Miss. 123, 161, 46 So. 497, 511 (1908) we find the following statement:

> It is apparent on casual examination that, if between private persons, recovery in this case would be impossible. But a slice of sovereignty in the shape of a county as plaintiff erects itself here, and, while there can be no criticism of the authorities in trying to recover what may be legally public property, still courts will be disposed, if they can, to apply the same rules that the law applies as between the humblest and most unpretentious private citizens. This is incumbent on us, and exceptions in favor of sovereignty in matters of property on the application of the statute of limitations must have, of course, strict construction as against the sovereignty.

In *Reliance Manufacturing Company* v. *Barr*, 245 Miss. 86, 99, 146 So.2d 569, 574 (1962) the general rule is set out:

> The authorities hold generally, however, that the defense of equitable estoppel may apply to a state "in a proper case." Courts have not attempted to define what is meant by the phrase "in a proper case", and it has been pointed out that it is better that each case be controlled by its own facts. 31 C.J.S. Estoppel supra.

Notwithstanding the "common law rule," the assertion of title, more than three-quarters of a century after the execution and delivery by the State of its solemn patent, in my view, requires the interposition against it of the doctrine of equitable estoppel. If ever there was or is to be a "proper case" in which the defense of equitable estoppel is to prevail against the State, this case is that one.

IN THE SUPREME COURT OF MISSISSIPPI

MONDAY, JANUARY 2, 1973, COURT SITTING

NO. 46,635

INTERNATIONAL PAPER COMPANY OF
MOSS POINT, MISSISSIPPI

VS

MISSISSIPPI STATE HIGHWAY DEPARTMENT

This cause this day came on to be heard on the petition for a rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order and adjudge that said petition be and the same is hereby denied.

MINUTE BOOK "BQ" PAGE 92

I, Mrs. Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of the judgment entered by the Court in the cause therein stated, as the same appears of record on file in my office.

Given under my hand, with the seal of said Court affixed, at office, in the city of Jackson, Miss., this the 15th day of March, A.D., 1973.

/s/ Julia H. Kendrick

(Seal) Clerk of the Supreme Court

APPENDIX "C"

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 46,635

INTERNATIONAL PAPER COMPANY, APPELLANT,

VS.

STATE OF MISSISSIPPI, ET AL, APPELLEES.

Motion in Arrest of Judgment and to Vacate and Alter Same

COMES International Paper Company, Appellant herein, and files this its Motion in Arrest of Judgment herein entered and to Vacate and Alter the Same. As grounds for said motion, Appellant with respect says:

1. That the Court is without power to change, alter, void or disregard an unambiguous statute enacted by the Legislature unless that statute, or to the extent only that such statute, is adjudicated to be in conflict with or violative of the Constitution of this State or of the Constitution of the United States of America.

2. That the action of the Court at bar in establishing a rule of property which is at variance with a valid statutory enactment and the rules of property in existence at the time of the due implementation of that statute results to deprive this Appellant of its property and reinvests the State therewith contrary to Article 3, Sections 14 and 17 of the Constitution of Mississippi.

3. That the determination of the Court herein resulting to destroy the grants (contracts) of the State itself upon which Appellant's titles are founded, impairs the

obligations of said grants (contracts) in violation of Article 3, Sec. 16, of said Constitution of Mississippi.

4. That the Court's announced determination herein and judgment based thereon destroying the title to property granted by the State on the basis of a legislative enactment which the State was under no constitutional prohibition to enact constitutes a taking of Appellant's property by the State through the judgment of this Court in violation of Appellant's rights under Amendment XIV of the Constitution of the United States of America.

5. That the action of the Court and the judgment based thereon amounts to state action impairing the obligations of the State of Mississippi regarding its grants (contracts) in contravention of Appellant's rights assured by Article I, Sec. X of the Constitution of the United States of America.

6. The unwarranted assumption of legislative power by the judicial branch of the Government resulting from the action of the Court in this case violates Article IV, Section IV, of the United States Constitution guaranteeing to each state a republican form of government; and

7. For other reasons and grounds to be assigned.

WHEREFORE, Appellant moves the Court to hold its judgment in abeyance and to re-examine and correct same; and that, if Appellant be correct in its position as its undersigned counsel sincerely believe Appellant truly to be, this Court, availing of its Rule 33 and to prevent the working of an injustice, suspend its Rule 14 (c), grant a rehearing herein and deal with this matter within the orbit of the judicial powers of the Court whereby to more properly regard the constitutional rights of this Appellant.

Respectfully submitted,

/s/ George W. Rogers, Jr.
/s/ L. C. Gwin
/s/ Landman Teller
Attorneys for Appellant

APPENDIX "D"

IN THE SUPREME COURT OF MISSISSIPPI

MONDAY, MARCH 5, 1973, COURT SITTING

#46,635

INTERNATIONAL PAPER COMPANY OF MOSS POINT, MISSISSIPPI

VS

MISSISSIPPI STATE HIGHWAY DEPARTMENT

This cause this day came on to be heard on the motion in arrest of judgment and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said motion be and the same is hereby overruled.

MINUTE BOOK "BQ" PAGE 135

I, Mrs. Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of the judgment entered by the Court in the cause therein stated, as the same appears of record on file in my office.

Given under my hand, with the seal of said Court affixed, at office, in the city of Jackson, Miss., this the 15th day of March, A. D., 1973.

/s/ Julia H. Kendrick

(Seal) Clerk of the Supreme Court

APPENDIX "E"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 46,635

INTERNATIONAL PAPER COMPANY
APPELLANT

v.

STATE OF MISSISSIPPI, ET AL.
APPELLEES

Certificate

The undersigned does hereby certify as follows:

ONE. That he is and was at all times mentioned in this certificate Chief Justice of the Supreme Court of the State of Mississippi.

TWO. That he presided at all of the oral arguments of the original appeal of this cause.

THREE. That he presided in conference on the motion for rehearing and subsequent motion for leave to file the motion styled "Motion In Arrest of Judgment and to Vacate and Alter the Same," and consideration of the latter motion.

FOUR. That in consideration of this matter the Justices, notwithstanding the procedural rules of the Court, entertained the said motion on its merits as a motion for rehearing and debated and determined the jurisdictional and constitutional questions raised in said motion.

FIVE. The final judgment of the Court herein entered on March 5, 1973, which "overruled" said motion was the Court's judicial determination of the substantive jurisdictional and constitutional questions presented in the motion for the filing of which leave was sought.

WITNESS my hand and the seal of the Supreme Court of the State of Mississippi, this the 4th day of May, 1973.

/s/ Robert G. Gillespie
Chief Justice of the Supreme
Court of Mississippi

APPENDIX "F"

IN THE CHANCERY COURT OF JACKSON COUNTY, MISSISSIPPI

NO. 22,353

INTERNATIONAL PAPER COMPANY, COMPLAINANT,

VS.

THE STATE OF MISSISSIPPI, ET AL, DEFENDANTS.

Amended Bill of Complaint to Remove Clouds and for Injunction

COMES now your Complainant, International Paper Company, a New York corporation qualified to do business and doing business in Mississippi, and files this Amended Bill to Remove Clouds and for Injunction and makes Defendants hereto the State of Mississippi, upon whom process may be had upon the Attorney General, the Honorable A. F. Summer, an adult resident citizen of Hinds County, Mississippi, and the members of the Mississippi State Highway Commission in their official capacity, Sam Waggoner, Herschel G. Jumper and W. H. Pyron, all of whom may be found at the offices of the Mississippi State Highway Commission in Jackson, Mississippi.

I.

Complainant owns in fee simple those certain tracts or parcels of land located in Jackson County, Mississippi, more particularly described as follows:

Lot 2, Section 14; Lots 5, 6, 7 and 8 of Section 15 and Lots 7 and 8 of Section 17, Lowry Island Survey,

Township 7s Range 6w, Jackson County, Mississippi, all as shown by plats of said Lowry Island Survey on file in the office of the State Land Commissioner, less and except a 7/64th royalty interest in and to oil, gas and other minerals in and under said property.

The lands claimed by Complainant comprise all portions of the geographical areas located within the confines of the above described lots as shown on the aforesaid plats on file in the office of the State Land Commissioner lying above the level of mean low tide. Complainant makes no claim to title to such portions thereof which form the beds of well-defined streams and water-courses in said areas lying below the elevation of mean low water, title to which is recognized as being in the State of Mississippi. The geographical areas denominated by the aforesaid lot and section numbers are fully identified on maps and plats on file with the State Land Commissioner and the lands claimed by Complainant are capable of being located and established on the ground by accurate survey, as is the level of mean high tide and mean low tide within said areas.

Title to the aforesaid property passed from the United States of America to the State of Mississippi under the provisions of the Enabling Act that provided for the creation of the State of Mississippi, which Act was passed and adopted by the Congress of the United States on March 7, 1817, and thereafter ratified, confirmed and approved by incorporating its provisions into the first Constitution of the State of Mississippi, adopted August 15, 1817. Thereafter title passed out of the State of Mississippi and into Complainant by mesne conveyances, all as set forth in the deraignment of title attached hereto as Exhibit I and made a part hereof.

II.

The above described lands are now, and have been during the years following the issuance of the patents thereto by the State of Mississippi, in the open, notorious, exclusive and peaceful possession of the Complainant and its predecessors in title, which possession has been adverse to all other parties and which possession has been exercised in such manner as said lands are capable of by the payment of ad valorem taxes which have annually been levied and assessed against said lands by the State of Mississippi and by Jackson County, Mississippi, by the execution of oil, gas and mineral leases thereon to various parties, and no other person or party is or has been in possession or occupancy of said land, nor has any person or party other than officials of the State of Mississippi and its agencies made or asserted any claim of right, title or ownership to said lands.

III.

All of said lands were below mean high tide at the time of the admission of Mississippi to the Union as shown by the official United States Government Land Office plat and survey, a true and correct copy of which is attached hereto as Exhibit II, and therefore title to said lands passed to the State of Mississippi as part of the territorial waters thereof under the Act of Admission as hereinabove set forth. Following the admission of Mississippi as a state, the tidal lands embraced within the above description increased in elevation through the processes of accretion so that, at the time of the passage of Chapter XVII, Laws of the State of Mississippi of 1884, portions thereof were above mean high tide and portions thereof, outside of the beds of well defined water courses traversing the same, lay between the levels of mean high tide and mean low tide, which circumstances made them subject to survey, dis-

position and sale under the provisions of said Chapter XVII, Laws of 1884, the lands subject to the provisions of said Act being defined and designated therein as "tidal overflowed marsh lands subject to overflow . . ." Pursuant to the provisions of said Chapter XVII, Laws of 1884, said lands were surveyed, as shown by the official report of survey of J. M. T. Hamilton, Surveyor, a copy of which is on file in the office of State Land Commissioner and a copy of which is attached hereto and made a part hereof as Exhibit III, and as also shown by the official plat of said survey, a copy of which is likewise on file in the office of the State Land Commissioner, and a copy of which is attached hereto as Exhibit IV and made a part hereof.

IV.

Subsequent to the making of said survey and plat, the State of Mississippi, acting by and through the officials thereof duly authorized so to do, sold said lands to various individuals, among whom are Complainant's predecessors in title as to the lands which are the subject of this Bill of Complaint, all as shown in the deraignment of title attached hereto as Exhibit I. At the times that the various patents referred to in said deraignment of title were issued to Complainant's predecessors in title, portions of all lands described in the respective patents were located above the level of mean high tide and portions thereof were located between the levels of mean high tide and mean low tide and have so continued from the time of the issuance of said patents to the present day.

V.

Continuously, since the execution of the patents referred to in Exhibit I hereto, the State of Mississippi and its politicial subdivision, Jackson County, Mississippi, have recognized the hereinbefore described real property as the

private property of Complainant and its predecessors in title by assessing the same as private property on each and every Real Property Assessment Roll of Jackson County, Mississippi, and by other official acts, and all State and County taxes legally levied thereon have been paid by Complainant and its predecessors in title.

VI.

Such of the above described property as lies between the levels of mean high tide and mean low tide is so situated that the ownership, possession and use thereof by Complainant and its predecessors in title could not and will not constitute an obstruction of the navigable waterways of the State within the prohibition of Section 81 of the Constitution of 1890, since they are, at such times as they may be covered with water by the fluctuation of the tide, shallow or shoal waters which are not susceptible of reasonable navigation, nor will the lawful use thereof have any tangible effect on the right of the public to use the navigable waters of the State for fishing, boating, swimming and related endeavors, nor will any such use thereof obstruct or interfere with the rights of any riparian or littoral owner, said lands lying wholly between the beds of the East and West Pascagoula Rivers and adjoining no uplands or lands of a character different in nature or in quality of title.

VII.

Notwithstanding the matters of fact and law hereinabove set forth, Complainant is informed and believes and, on the basis of such information and belief, charges the fact to be that the officials and agents of the Mississippi State Highway Commission and the State Highway Department are asserting and claiming that the aforesaid patents to the Complainant's predecessors in title are invalid, and that title to said property remains vested in the

State of Mississippi; that said State Highway Department plans to enter upon and construct thereon a segment of Interstate Highway 10 without compensating Complainant for the appropriation for public use of said properties; that such threatened trespass upon the lands of Complainant is imminent, the State Highway Department having already instituted suit for the condemnation of other lands of Complainant lying on the west bank of the West Pascagoula River immediately opposite the land described herein; that agents of said State Highway Department have already entered upon said lands without the permission of the owner thereof and have surveyed and marked the course across which said highway is to be constructed; that the injuries and damages being sustained by such trespasses and those which will be sustained by Complainant by such construction will be irreparable; that Complainant has no adequate remedy at law and Complainant is entitled to an injunction to restrain the said Mississippi State Highway Commission, its officers, agents or employees from trespassing on the above described lands of Complainant.

VIII.

The aforesaid claim on the part of officials of the State of Mississippi that said patents are void and passed no title to Complainant's predecessors in title cast doubt and suspicion upon the whole of the title of Complainant in and to the aforesaid real property sought to be confirmed herein that can and ought to be removed as clouds upon Complainant's title, and for said reasons the State, by and through the Attorney General, is made a party hereto so that the Court may do complete equity in the premises.

WHEREFORE, premises considered, Complainant prays that the above named Defendants be summoned to answer this Bill of Complaint in the manner prescribed by law, answer under oath being hereby waived; and upon a hearing hereon being had, the Court will enter a decree:

1. Cancelling as clouds on Complainant's title all claims of the said Mississippi State Highway Commission or other officers or agents of the State of Mississippi that ownership of said lands is vested in the State of Mississippi; and

2. Enjoining the officials of the Mississippi State Highway Commission, their agents and employees and all other persons or parties acting in concert with them from entering upon or otherwise trespassing upon the above described lands of Complainant unless and until a right of way has been secured from Complainant in conformity with the applicable statutes on Eminent Domain;

And Complainant prays for general relief.

AS IN DUTY BOUND, ETC.

International Paper Company

By: /s/ George W. Rogers, Jr.
/s/ C. W. Ford
/s/ L. C. Gwin
Solicitors for Complainant

STATE OF MISSISSIPPI,)
)
COUNTY OF WARREN.)

PERSONALLY appeared before me, the undersigned authority in and for the jurisdiction aforesaid, George W. Rogers, Jr., who being by me first duly sworn on oath states that he is one of the solicitors for the Complainant duly authorized in the premises; that the matters and things positively stated in the foregoing Bill are true as therein stated; and that those stated on information and belief are upon trustworthy information which Affiant believes to be true, and that this verification is upon the personal knowledge, or information as the case may be, of said Affiant.

/s/ George W. Rogers, Jr.
Affiant

SWORN to and subscribed before me this the 23rd day of April, 1971.

/s/ Lucy Arcaro
(Seal) Notary Public
My commission expires 4-2-74

FILE COPY

Supreme Court, U. S.
FILED
JUN 26 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1609

INTERNATIONAL PAPER COMPANY,
Petitioner,

vs.

STATE OF MISSISSIPPI, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF FOR RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Chancery Court of Jackson County, Mississippi is unreported, annexed as Appendix "A", page A1 hereof.

JURISDICTION

The jurisdictional statement of the petitioner discloses no basis for the issuance of the writ, under 28 USCA Section 1257 (3) and Supreme Court Rule 19 (a). Respondents' objections are fully set out in the Argument.

STATUTORY PROVISIONS

Chapter 17, Laws of the State of Mississippi of 1884 appears as Appendix "B", page A4 hereof.

Section 4142 of the Mississippi Code of 1942 appears as Appendix "C", page A6 hereof.

STATEMENT OF CASE

Under Mississippi law exhibits to a complaint control over the allegations made in the complaint. (*Williams* v. *Wilson*, 129 So. 2d 125 (Miss 1961)) The exhibits omitted from the amended complaint, Appendix "F", page A23 of the petition, are as follows:

(a) Petitioner's deraignment of title (Exhibit I)

(b) The official U. S. Government Survey (Exhibit II)

(c) The report of J. M. T. Hamilton, Surveyor (Exhibit III)

(d) The official plat of the Hamilton survey (Exhibit IV)

These exhibits are referred to both in the trial court's opinion, Appendix "A", page A1 hereof, and in the controlling opinion of the Mississippi Supreme Court, Appendix "A", page A1 of the petition.

The "Lowry Island" area surveyed by Mr. J. M. T. Hamilton consisted of approximately twenty square miles of the Bay of Pascagoula on the Mississippi Sound. Mr. Hamilton, in making his "survey" by boat, divided the entire Bay of Pascagoula between the East and West prongs

of the Pascagoula River into "lots" of approximately 40 acres each. These "lots" indiscriminately included navigable waters, bayous, water bottoms, and tidal marshlands. No fast lands were delineated on the survey.

The area surveyed included more than twenty thousand acres of the Bay of Pascagoula, approximately five thousand acres of which are claimed by petitioner. These "lots" were sold by the State Land Commissioner between 1894 and 1917 to land speculators for prices varying between fifty cents and $1.25 an acre. This area, as pointed out in the controlling opinion of the Mississippi Supreme Court, "does not lend itself to the normal characteristics of possession inasmuch as it is marsh and swampland." There was no allegation in the amended complaint that the petitioner or its predecessors in title have taken physical possession of these tidal areas, had erected any improvements of any type, kind or description thereon, or had made any public use of such tidal areas. Petitioner acquired its claimed title to these tidal areas in 1967, knowing that the State of Mississippi was contending that the basic patents were void.

Neither the petitioner nor its predecessors in title have sought to obtain repayment from the State for the purchase price of the State patents, taxes paid thereon and interest at the rate of six percent per annum, under Section 4142, Mississippi Code of 1942 (Appendix "C", page A6 hereof).

ARGUMENT

1. The Petition for Certiorari Was Not Timely Filed.

The judgment of the Mississippi Supreme Court affirming the decree of the trial court was rendered on July 3, 1972. Petition for rehearing was filed by the petitioner and overruled by the Mississippi Supreme Court on January 2, 1973. The filing of the petition for rehearing suspended the court's final judgment until January 2, 1973 when the petition for rehearing was disposed of. *Burton* v. *Redmond*, 71 So. 2d 772 (Miss 1954).

The subsequent filing of petitioner's motion for leave to file a motion to arrest and vacate the Mississippi Supreme Court's judgment did not further suspend the finality of the Court's denial of the petition for rehearing on January 2, 1973. *Deckker* v. *Bryan Bros. Packing Co.*, 162 So. 2d 648 (Miss 1964).

No order was entered by the Mississippi Supreme Court staying its final judgment. Both its judgment of July 3, 1972 and the denial of the petition for rehearing on January 2, 1973 were officially reported prior to its overruling the motion to arrest judgment. *International Paper Company of Moss Point, Mississippi* v. *Mississippi State Highway Department*, 271 So. 2d 395. Appendix "A", page A1 of the petition.

Petitioner neither requested nor was granted an extension of time by the Mississippi Supreme Court within which to apply to this Court for certiorari. The petitioner did not make an application for extension of time to this Court or to any Justice thereof.

Under these facts the filing of the petition for certiorari on May 31, 1973 did not vest jurisdiction in this Court.

Title 28, § 1257 (3). *Gypsy Oil Co.* v. *Escol*, 48 S. Ct. 112, 275 U.S. 498, 72 L. Ed. 393. *Citizens Bank* v. *Opperman*, 39 S. Ct. 330, 249 U.S. 448, 63 L. Ed. 701.

2. The Asserted Federal Constitutional Questions Were Neither Timely Nor Properly Raised in the Trial Court or in the Mississippi Supreme Court, nor Expressly Passed on.

Prior to the judgment of the Mississippi Supreme Court rendered on July 3, 1972, the petitioner did not raise any federal constitutional questions, either in its amended complaint, in the trial court or in the Mississippi Supreme Court. The petitioner's assignments of error in the Mississippi Supreme Court raised none of the federal constitutional questions now asserted by petitioner. The asserted federal questions were not raised on the petition for a rehearing, overruled by the Mississippi Supreme Court on January 2, 1973.

The opinion of the trial court, Appendix "A", page A1 hereof, the opinion of the Mississippi Supreme Court, Appendix "A", page A1 of the petition, and the dissenting opinion on rehearing, Appendix "B", page A11 of the petition, dealt solely with questions of state law. The Mississippi Supreme Court in overruling the petitioner's motion in arrest of judgment rendered no opinion thereon.

The Mississippi Supreme Court on a petition for rehearing will not consider any point not assigned as error on the original presentation of the case on the original appeal. *Frady* v. *Bryan*, 48 So. 2d 611 (Miss 1950).

Under Mississippi law the Mississippi Supreme Court will not consider or pass upon constitutional questions not raised in the trial court. *Stewart* v. *City of Pascagoula*,

206 So. 2d 325 (Miss 1968); *State ex rel. Carr* v. *Cabana Terrace, Inc.*, 153 So. 2d 257 (Miss 1963).

This rule applies to bills to quiet and confirm title. *Comfort* v. *Landrum*, 52 So. 2d 658 (Miss 1951).

The certificate of the Chief Justice of the Mississippi Supreme Court, Petition Appendix "E", page A21, that in the consideration of the motion in arrest of judgment the Court "entertained the said motion on its merits as a motion for rehearing and debated and determined the jurisdictional and constitutional questions raised in said motion" must be viewed and construed in the light of applicable Mississippi law.

The certificate of the Chief Justice is not controlling, and cannot avail to foreclose inquiry by this Court as to whether federal questions were properly raised and presented in the Court below. *Honeyman* v. *Hanan*, (1937) 57 S. Ct. 350, 300 U.S. 14, 81 L. Ed. 476, appeal dismissed 58 S. Ct. 273, 302 U.S. 375, 82 L. Ed. 312. *Powell* v. *Brunswick County, Va.*, (1893) 14 S. Ct. 166, 150 U.S. 433, 37 L. Ed. 1134.

This Court has consistently ruled that before its jurisdiction can be invoked on certiorari from a state court, it must appear that the federal questions involved were raised in the state courts at the proper time: *Hulbert* v. *Chicago*, 26 S. Ct. 617, 202 U.S. 275, 50 L. Ed. 1026 (1906); *Brown* v. *Commonwealth of Mass.*, 12 S. Ct. 757, 144 U.S. 573, 36 L. Ed. 546 (1892); *Pennsylvania R. Co.* v. *Illinois Brick Co.*, (1936) 56 S. Ct. 556, 297 U.S 447, 80 L. Ed. 796.

The Mississippi Supreme Court on a second petition for rehearing will only consider jurisdictional questions. Petitioner's attempt to raise federal constitutional questions in a motion to arrest the judgment after judgment was,

we submit, improper: *Sayward* v. *Denny*, 158 U.S. 180, 15 S. Ct. 777, 39 L. Ed. 941 (1895). In any event, the motion was denied without opinion: *Bailey* v. *Anderson*, 66 S. Ct. 66, 326 U.S. 203, 90 L. Ed. 3 (1945), rehearing denied 66 S. Ct. 228, 326 U.S. 691, 90 L. Ed. 407; *Street* v. *New York*, 89 S. Ct. 1354, 394 U.S. 576, 22 L. Ed. 572; *Carter* v. *Berry*, 142 So. 2d 13, 95 ALR 2d 791 (Miss 1962).

3. The Asserted Federal Constitutional Questions Do Not Raise Any Substantial Federal Question.

The jurisdictional statement of petitioner presents no substantial federal question. The contention of the petitioner that the judicial decision of the Mississippi Supreme Court holding that the State land patents under which petitioner claims fee simple title to state trust tidelands were void under Mississippi law, impairs the obligations of its patents as contract, invoking Article 1, §10, cl. 1 of the Federal Constitution, has been repeatedly rejected by this court. *Barrows* v. *Jackson*, 73 S. Ct. 1031, 346 U.S. 249, 97 L. Ed. 1586, rehearing denied 74 S. Ct 19, 346 U.S. 841, 98 L. Ed. 361; *Fleming* v. *Fleming*, 44 S. Ct. 246, 264 U.S. 29, 68 L. Ed. 547; *Tidal Oil Company, et al.* v. *Flanagan*, 263 U.S. 444, 44 S. Ct. 197, 68 L. Ed. 382; *Mississippi and Missouri R. Co.* v. *McClure*, 26 Iowa 243, appeal dismissed 77 U.S. 511, 10 Wall. 511, 19 L. Ed. 997.

In *Fleming* v. *Fleming*, supra, petitioner's argument of legislation by judicial interpretation was advanced in the state court in the same manner, that is on an application for a second rehearing. This Court in dismissing said that such an argument is "ingenuous but unsound." [*Fleming* v. *Fleming*, supra, p. 247]

The same contention, invoking the due process clause of the 14th Article of Amendment to the Federal Constitu-

tion has likewise been rejected by this Court. *Fox River Paper Co.* v. *Railroad Commission of Wisconsin*, 47 S. Ct. 669, 274 U.S. 561, 71 L. Ed. 1279; *Tracy* v. *Ginzberg*, (1907) 27 S. Ct. 461, 205 U.S. 170, 51 L. Ed. 755. In the latter case this Court aptly said:

> "The 14th Amendment did not impair the authority of the states, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before them controverted questions as to the ownership of property, which did not involve any right secured by the federal constitution, or by any valid act of Congress, or by any treaty."

4. The Judgment of the Mississippi Supreme Court Rests on an Adequate Non-Federal Basis.

Property rights in Mississippi's public trust tidelands are a matter of state law. *Shively* v. *Bowlby*, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894); *Fox River Paper Co.* v. *Railroad Commission of Wisconsin*, supra. The petition does not deny paramount state authority in this field.

Mississippi's public trust doctrine as to the ownership and control of its tidelands is predicated on and follows the holdings of this Court in *Illinois Central Railroad* v. *Illinois*, 13 S. Ct. 110, 146 U.S. 387, 36 L. Ed. 1018. The Mississippi Supreme Court has repeatedly cited this case with approval. *Money* v. *Wood*, 118 So. 357 (Miss 1928); *State* v. *Stewart*, 184 So. 44 (Miss 1938); *Pace* v. *State*, 4 So. 2d 270 (Miss 1941).

Appellant's statement that Appleby v. New York, 271 U.S. 364, 70 L. Ed. 992 is controlling is not supported by the facts and the law in that case. In Appleby this Court clearly and carefully distinguished the facts and applicable law from its previous decision in *Illinois Central*

Railroad Co. v. *Illinois*, supra, relative to the attempted sale by the State of Illinois of one square mile of the bed of Lake Michigan.

The *Illinois Central Railroad* case decided by this Court, and the case at bar as decided by the Mississippi Court, are factually and doctrinally controlling. In the former case one square mile and 1,000 acres of tidelands in the bed of Lake Michigan were involved. In this case twenty square miles and 20,000 acres of tidelands in the bed of the Pascagoula Bay are involved, 5,000 acres of which are claimed by the petitioner.

Petitioner argues that the Mississippi Supreme Court has retroactively established a new rule of law and property rights in its tidelands by its decision in the case at bar, and that this justifies federal intervention, citing *Martin* v. *O'Brien*, 34 Miss 21 (Miss 1857). That case did not even inferentially pass upon the authority of the state legislature, under the 1884 act (Appendix "B" page A4 hereto), to direct the survey of the Bay of Pascagoula, and to authorize the sale of the public trust tidal areas in such bay to private persons for private purposes. The 1857 case involved the right of a town acting under a state statute to grant a permit to a private company for the construction of a public wharf on the *public* trust tidelands. The Mississippi Supreme Court held that this being *for a public purpose* there was no violation of the public trust purposes. (emphasis added)

As pointed out by the controlling opinion of the Mississippi Supreme Court, the statute under which petitioner asserts its tidelands claims was *initally* considered in *Money* v. *Wood*, supra. (emphasis added) The rule of law and property announced in *Money* v. *Wood*, supra, has been consistently followed by the Mississippi Supreme Court.

The contention of the petitioner that tidal marsh islands cannot be held to be subject to the public trust doctrine has been rejected by this Court.

In *Shively* v. *Bowlby*, supra, this Court said:

> "Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishing. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and control of them are vested in the sovereign for the benefit of the whole people."

Tidal marsh islands, sand bars, and mud flats of navigable waters are subject to the public trust doctrine. *Baer* v. *Moran Brothers Company*, 14 S. Ct. 823, 153 U.S. 287 (1894), 38 L. Ed. 718. *United States* v. *Turner*, 175 F. 2d 644, 647 (Fifth Circuit 1949), 338 U.S. 851, 70 S. Ct. 92, 94 L. Ed. 521.

Mississippi's interests in these tidal areas are not asserted in a proprietary capacity, but in its right of sovereignty and as the trustee for public rights in such areas. The doctrine is one of common law origin, but is held to be an inherent duty and obligation of the state in the exercise of its sovereignty.

The assertion that such sovereign rights can be lost to the people of the state because of the unauthorized acts of public officials of the state is the same thesis rejected by this Court in *Illinois Central Railroad Co.* v. *Illinois*, supra, and in *United States* v. *California*, 332 U.S. 19, 91 L. Ed. 1889, 67 S. Ct. 1658.

In the latter case this Court aptly stated:

"And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."

CONCLUSION

We respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

IN THE CHANCERY COURT MARCH TERM, 1971
STATE OF MISSISSIPPI COUNTY OF JACKSON

No. 22,353

INTERNATIONAL PAPER COMPANY
Complainant

VS.

STATE OF MISSISSIPPI, ET AL.
Defendants

Opinion on Sustaining Demurrer

(Filed March 30, 1971)

The Court has heard the argument of counsel and extensive briefs filed in the matter, carefully examined the exhibits to the Bill and other muniments of title referred to in the deraignment set forth in the Bill of Complaint and it is the opinion of the Court that the face of the pleadings show that these lands were below mean high tide at the time of the admission of Mississippi to the Union as shown by the United States Government Land Office plat and survey and therefore title to said lands passed to the State of Mississippi as part of the territorial waters thereof under the Act of Admission of Mississippi to the Union.

The Bill goes on to state that at the time of Admission it was under tide water and that later because of accretion it built up to above tide level. It shows further that it lies wholly between the East and West Pascagoula Rivers and is not adjacent to fast land on either bank of the rivers.

The pleadings further show that back in 1884 the Legislature passed an Act to have the land surveyed and sold and the Bill attaches a copy of the surveyor's report and plat made subsequent to said Act and then shows patents issued to various individuals which patents are referred to in the chain of title in the Bill by book and page and from these original patentees came down to the present complainant, International Paper Company, who seeks to confirm the title or rather remove a cloud when the State Highway Department threatens to build a bridge or causeway across it for highway purposes.

It is the opinion of the Court that when these lands came to the State of Mississippi as submerged lands that the State of Mississippi became the owner thereof as Trustee for the people of the State and subject only to the paramount right of the United States to control commerce and navigation.

That the ownership of the State was and is as Trustee for the use and benefit of all people of the State and it is not subject to conveyance to private individuals for private purposes. Yet the thrust of the Bill of Complaint is that the conveyances were made to private individuals for private purposes.

The Woods case and the Saucier cases seem to have put the matter to rest but the recent Truting case is used by complainant as an argument contrary to the former holdings. However the Truting case was under a special act of the Legislature declared to be in its overall effect for the use and benefit of the public and we do not think that this case helps the present situation.

It is our view that the General Demurrer should be sustained.

This obviates the necessity of ruling on the special demurrers at this time but it is the opinion of the Court that the Attorney General of the State of Mississippi for and on behalf of the State of Mississippi should be made a party to the suit rather than have it limited merely to the State Highway Commission. We do not feel that the other grounds of special demurrer are well taken for the reason that none of these bodies are given control over the actual lands but are given eminent domain powers if they need to take any land.

A lengthy discussion of the authorities at this time seems needless. It is sufficient to say that the Court has carefully considered the authorities and the discussion of the same in the briefs of the respective parties.

This 29th day of March, 1971.

/s/ L. C. Corban
Chancellor

APPENDIX "B"

Chapter XVII, Mississippi Laws of 1884

AN ACT authorizing the Survey and Sale of certain Marsh Lands belonging to the State of Mississippi, lying on the banks of the East and West Pascagoula and Pearl Rivers, and other Streams navigable and unnavigable flowing into the Mississippi Sound, and the Lakes bordering thereon.

SECTION 1. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI, That the survey of all the tidal overflowed marsh lands subject to overflow, lying on the banks of East and West Pascagoula River and Pearl River, and all other rivers emptying into the Mississippi Sound and Gulf of Mexico, and all tidal lands subject o overflow in or upon any island, or islands subject to entry, lying within the waters of the Gulf of Mexico, or Mississippi Sound, and the rivers or tributaries emptying therein, shall be made by the Commissioner of Swamp Lands, upon the recommendation of the Governor, with the concurrence of the Attorney-General and Secretary of State, at as early a date as practicable. That so soon as said lands are properly classified, surveyed, and the field notes, plats and the diagrams deposited in the proper office in Jackson, that they shall be sold in such manner, and at such time, and for such price, by the Commissioner of Swamp Lands, as the Governor, Attorney General and Secretary of State shall designate; provided, that parties having made any permanent improvement to the value of one hundred and fifty dollars upon any lands so surveyed and to be sold, shall be entitled to the preference in entering the same, at the price to be designated as aforesaid; provided, he or they shall

within thirty days after said lands are properly listed and offered for sale, forward to the Commissioner of Swamp Lands the amount in cash necessary to purchase such lands as he or they propose to purchase.

SECTION 2. Be it further enacted. That all lands surveyed and listed under the provisions of this act shall be entered in the office of the Commissioner of Swamp Lands, who shall hereafter be Surveyor General of "Gulf Coast Lands" and all accounts and monies derived from the sale of these lands shall be so kept as to show from what source obtained. The Commissioner in his report of survey shall give an accurate description of the land, and a description and estimated values of improvements, if any thereon.

SECTION 3. Be it further enacted, That all laws in force regulating the sale of swamp lands in this State shall be applicable to the sale of "Gulf Coast Lands."

Section 4. Be it further enacted. That this act take effect and be in force from and after its passage.

Approved, March 15, 1884.

APPENDIX "C"

Section 4142, Mississippi Code of 1942

Section 4142. Failure of title to public lands.

If the title to any public land sold by the state through the auditor or land office, or by any municipality shall fail, or shall have failed, the state or such municipality, as the case may be, shall refund the purchase-money to its vendee or his heirs or assigns, and if no profits have been received from said lands, then all taxes shall be returned also, and all fees paid, with interest as six per centum per annum; but except as hereinabove provided, the question of failure of title can only be determined, in a suit filed in the county in which the land is situated, and the land commissioner or the municipality, as the case may be, shall be made a party to every such suit; but where such failure of title shall have been caused by the cancellation of a patent issued by the state, or a deed from the municipality, and such cancellation has been made under the requirements of any law or decree of a chancery court of this state, directing cancellation in favor of prior purchasers, or through the failure of the state's title, or the title of the municipality, as the case may be, the failure of title so caused shall not be required to be determined by decree of court.